Criminal Rules Advisory Committee Meeting
September 12, 2012

Present: Justice Daniel Eismann, Judge James Cawthon, Judge John Melanson, Ken Jorgensen, Roger Bourne, Rob Chastain, Cathy Derden.

Present by phone: Anne Marie Kelso, Grant Loebs, Bryce Powell, Denise Price, Chuck Peterson, Bruce Withers.

Electronic Notary. The Committee received a request from Matthew Gamette, Idaho State Police Forensic Services Quality Manager asking that Rule 5.1 on preliminary hearings be amended to allow for e-signatures and eNotarization of affidavits from the state lab.

The ISP Forensic Services laboratory system is implementing a completely new information management system. The system will allow officers and prosecutors to log in remotely and access reports and case information. The lab is currently printing reports and affidavits, signing them, notarizing them, and scanning them to the electronic webpage where prosecutors can access them. This is a time intensive administrative process and the lab is now getting requests from many county courts and prosecutors to provide the entire case file in every case (all the laboratory documentation) electronically to them. The lab just started scanning all these records into the system but now plans to accommodate these requests by creating the documents completely electronically in the new system (there will never be a paper copy of the record). The lab would like to be able to electronically notarize the affidavit (or to do away with the requirement for notary) because the lab does not want to waste time printing, notarizing, and scanning affidavits back into the system. The new system will have a unique login for each user, will require pin authentication before application of a secure digital signature, will not be accessible to the public, and will have many security procedures to make it much more secure than even the current system. It was questioned whether Idaho was keeping up with the proliferation of electronic only records and noted that many states have laws allowing for electronic notary. It was also noted that eNotary is a rapidly developing field where software is used to place a secure signature and/or a notary digital seal into a tamper evident document (such as a PDF). eNotary basically works like a notary, just with secure digital stamps and signatures instead of an ink stamp and ink signature.

The request was to either allow the ISPFS laboratory to use a secure electronic reporting system with pin coded electronic signatures in place of a notary, or allow for electronic notary, or support ISP legislation for electronic notary.

In discussion, the Committee reviewed I.C. § 28-50-111, part of the Uniform Electronic Transactions Act, entitled "Notarization and Acknowledgment" that provides: If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record." The Committee also recognized that Idaho is moving in the direction of electronic filings and was in favor of allowing for e-signatures on affidavits as well as eNotarization.

The Committee voted in amending ICR 5.1 as follows:

Rule 5.1. Preliminary hearing - Probable cause hearing - Discharge or commitment of defendant - Procedure.

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(b) Probable cause finding. If from the evidence the magistrate determines that a public offense has been committed and that there is probable or sufficient cause to believe that the defendant committed such offense, the magistrate shall forthwith hold the defendant to answer in the district court. The finding of probable cause shall be based upon substantial evidence upon every material element of the offense charged; provided that hearsay in the form of testimony, or affidavits, may be admitted to show the existence or nonexistence of business or medical facts and records, judgments and convictions of courts, ownership of real or personal property and reports of scientific examinations of evidence by state or federal agencies or officials or by state-certified laboratories, provided the magistrate determines the source of said evidence to be credible. Provided, nothing in this rule shall prevent the admission of evidence under any recognized exception to the hearsay rule of evidence. The defendant shall be entitled to cross-examine witnesses produced against the defendant at the hearing and may introduce evidence in defendant's own behalf. Motions to suppress must be made in a trial court as provided in Rule 12; provided, if at the preliminary hearing the evidence shows facts which would ultimately require the suppression of evidence sought to be used against the defendant, such evidence shall be excluded and shall not be considered by the magistrate in his determining probable cause. A record of the proceedings shall be made by stenographic means or recording devices. Affidavits under this rule may have the signature of the affiant and the person who administered the oath in electronic form, as well as the notary seal.

The proposed language will be circulated for further comment and review by the Administrative Conference.

Rule 44.2(2). There was a proposal from the SAPD to amend this rule on mandatory appointment of counsel for post-conviction review after imposition of death penalty to make clear the compensation and payment provisions only apply in cases where the SAPD has not been appointed, and to make the compensation have a minimum, but not a maximum, to give courts more discretion to take into consideration the needs of the case and the area where the case occurred. The proposed amendments were:

Rule 44.2. Mandatory appointment of counsel for post-conviction review after imposition of death penalty.
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(2) Compensation and Payment of Expenses.
In cases in which the State Appellate Public Defender has not been appointed:
(a) Unless counsel is employed by a publicly funded office, lead counsel appointed to represent a capital defendant in post-conviction proceedings shall be paid an hourly rate of not less than one hundred dollars ($100.00) per hour.

(b) The trial court shall authorize additional payments for expenses incidental to representation (including, but not limited to, investigative, expert and other preparation expenses) necessary to adequately litigate those post-conviction claims that are allowed pursuant to I.C. § 19-2719, to the same extent as a person having retained his own counsel is entitled.
(c) Compensation and payment of expenses shall be made pursuant to the provisions of I.C. § 19-860(b). Counsel shall submit timely claims for compensation and payment of expenses in the manner provided in I.C. § 31-1501 et seq.

The Committee found the first proposed amendment to be unnecessary since the rule already begins with language stating "unless counsel is employed by a publicly funded office". Currently there are several publicly funded agencies that may handle death penalty post-conviction cases, including the State Appellate Public Defender, County Public Defenders, and Federal Public Defenders. No reason was seen to single out the SAPD in the rule.

As for the proposal to make the $100 an hour the minimum, it was noted the reason for the maximum was so as not to overly burden counties.

The Committee voted 9-2 against these amendments.